86-668

Supreme Court, U.S.
FILED
OCT 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-

In the Supreme Court of the United States

OCTOBER TERM, 1986

MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,
Petitioner,

v.

DAVID DELMAN
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October 21, 1986

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QUESTION PRESENTED

Section 2 of the United States Arbitration Act ("Arbitration Act"), 9 U.S.C. § 2, mandates enforcement of valid agreements to arbitrate statutory claims, unless Congress has otherwise expressly exempted the claims from arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. ____, 105 S. Ct. 3346, 3355, 87 L. Ed. 2d 444, 456 (1985). Whether judicially implied rights of action under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78111 ("1934 Act"), are exempt from this arbitration mandate is an open question. *See Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985). The Court below held that arbitration of such claims cannot be compelled.

The question therefore presented is:

1. Did the court below err in holding that the mandate of the federal Arbitration Act does not apply to rights of action judicially implied under section 10(b) of the 1934 Act?

PARTIES TO THE PROCEEDING

All of the Parties to the proceeding below are listed in the caption.*

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*Pursuant to Rule 28.1 of the Court, petitioner Merrill Lynch, Pierce, Fenner & Smith Inc. states that it is a subsidiary of Merrill Lynch & Co., Inc., a publicly held corporation whose shares are traded on, among others, the New York Stock Exchange. Subsidiaries of Merrill Lynch, Pierce, Fenner & Smith Inc. that are not wholly-owned are: Merrill Lynch & Co., Canada, Ltd.; Merrill Lynch Canada Incorporated/Incorporee; Merrill Lynch Life Agency Inc. (Ohio); Merrill Lynch Life Agency Inc. (Oklahoma); Merrill Lynch Life Agency Ltd. (Mississippi); Merrill Lynch-Nomura Management Company, Inc.; and ML Life Agency Inc. Affiliates of Merrill Lynch, Pierce, Fenner & Smith Inc. that are not wholly-owned by Merrill Lynch & Co., Inc. are ISU Companies, Inc.; Merrill Lynch Bank & Trust Co.; Merrill Lynch International Bank Limited; Mership Nominees Limited; Michigan Mart Properties Corp.; Peaback Properties, Inc.; Iran Financial Services Company S.S.K.; Merrill Lynch Asset Management Limited; Merrill Lynch (Australia) Pty Limited; Merrill Lynch, Pierce, Fenner & Smith (Brokers & Dealers) Limited; Merrill Lynch, Pierce, Fenner & Smith Limited; Royal Securities Corporation (Canada) Limited; Paluel-Marmont Merrill Lynch S.A.; Merrill Lynch Philippines, Inc.; Merrill Lynch, Pierce, Fenner & Smith Belge S.A.; Merrill Lynch, Pierce, Fenner & Smith (Middle East) S.A.L.; Merrill Lynch, Pierce, Fenner & Smith S.A.; Merrill Lynch S.A.L.; Merrill Lynch, Pierce, Fenner & Smith (Taiwan) Ltd.; Property Protection Associates & Co.; Merrill Lynch — Sun Hung Kai (Overseas Securities) Company Limited; Sun Hung Kai-Merrill Lynch Commodities Limited; Merrill Lynch Representacoes Ltda.; Merrill Lynch Realty Commercial Services of Georgia, Inc.; Hammill-Quinlan, Inc.; Merrill Lynch Realty North Bay Inc.; Merrill Lynch Realty/North Los Angeles, Inc.; Merrill Lynch Realty/Boomhower, Inc.; Merrill Lynch Realty/Burnet, Inc.; Merrill Lynch Realty Carll Burr, Inc.; Merrill Lynch Realty/Cousins, Inc.; Merrill Lynch Realty Santa Barbara, Inc.; Merrill Lynch Realty/Jack Matthews, Inc.; Merrill Lynch Realty/Katella, Inc.; Merrill Lynch Realty/MCK, Inc.; Merrill Lynch Realty/Richard Jowdy, Inc.; Merrill Lynch Realty/Robedeaux, Inc.; Merrill Lynch Realty/Tom Fannin Inc.; and ML/Rodgers & Cummings Insurance, Inc.

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No. 86-

In the Supreme Court of the United States

OCTOBER TERM, 1986

MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,
Petitioner,

v.

DAVID DELMAN
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch"), respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not reported and is reprinted in the Appendix at 1a.[1]

The amended decision of the district court, dated July 22, 1985, is not reported and is reprinted in the Appendix at 3a.

[1]Citations to material printed in the annexed Appendix appears as "_____ a".

JURISDICTION

The Court of Appeals issued its decision on July 25, 1986. Petitioner invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are:

1. United States Arbitration Act, ch. 392, 61 Stat. 670 (1947) (codified at 9 U.S.C. § 2);

2. Securities Exchange Act of 1934, Section 10(b), 15 U.S.C. § 78j(b);

The Appendix to this petition sets forth the pertinent text of the statutory provisions. (15a).

STATEMENT OF THE CASE

A. Factual and Procedural Background

Merrill Lynch is the largest securities broker-dealer in the United States, with business conducted throughout the country.

In or about March, 1982, respondent opened a securities account with Merrill Lynch at its San Jose, California branch office.

In connection with opening his account, respondent entered into a written Customer Agreement with petitioners. (16a). Paragraph 11 of the Customer Agreement provides, in relevant part, that:

> "It is agreed that any controversy between us arising out of your business or this agreement shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, Inc. or

> pursuant to the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., as the undersigned may elect."

On or about April 27, 1982, respondent determined to engage in options trading. In connection therewith, respondent then executed an Option Agreement (24a), which provides at paragraph 9, that:

> "Any controversy between us arising out of such option transactions or this agreement shall be settled by arbitration only before the National Association of Securities Dealers, Incorporated, or the New York Stock Exchange, or an Exchange located in the United States upon which listed options transactions are executed."

In July 1984, respondent brought this action against petitioner. The first claim for relief, entitled a claim for "securities fraud," is alleged to arise pursuant to section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b). Respondent's remaining claims for relief are pendent state claims.

B. The Decisions Below

In response to the Complaint, petitioner filed an Answer asserting as an affirmative defense that binding agreements to arbitrate controversies had been entered into by the parties. At the time the Answer was filed, however, the Ninth Circuit's decision in *Byrd v. Dean Witter Reynolds, Inc.*, 726 F.2d 552 (9th Cir. 1984), *rev'd, Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985), precluded arbitration of the pendent state claims for relief, as those claims are factually intertwined with the 1933 Act and 1934 Act claims.

On March 4, 1985, the *Byrd* decision was reversed by this Court, and on April 11, 1985, appellant made its

demand for arbitration on respondent. The demand for arbitration was rejected by respondent and, accordingly, petitioner filed a Petition to Compel Arbitration of the disputes and a Motion for Stay of Proceedings, pursuant to the Arbitration Act.

The district court granted the Petition to Compel Arbitration with respect to the pendent state claims alleged by respondent. However, the district court refused to compel arbitration of respondent's 1934 Act claim or to stay proceedings before it as to that claim.

On appeal, the Ninth Circuit affirmed the district court, holding that the implied claim arising under section 10(b) of the 1934 Act is exempt from the mandate of the Arbitration Act, relying on its recent opinion in *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520 (9th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3159 (U.S. Aug. 29, 1986) (No. 86-321).

REASONS FOR GRANTING THE WRIT

This Court has admonished repeatedly that the Arbitration Act reflects, "a national policy" mandating enforcement of valid arbitration agreements — a mandate that may not be avoided unless Congress itself has explicitly exempted a particular statutory claim from arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. ____, 105 S. Ct. 3346, 3355, 87 L. Ed. 2d 444, 456 (1985). In *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. at 216 n.1, 105 S. Ct. at 1240 n.1, 84 L. Ed. 2d at 162 n.1, the Court expressly left unanswered whether the congressional bar it found to arbitration of claims asserted under the 1933 Act, *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182,

98 L. Ed. 168 (1953), applies equally to judicially implied rights of action asserted under the 1934 Act.[2]

This case squarely raises the arbitrability of an implied 1934 Act claim, an issue which, we respectfully submit, warrants determination by this Court.

I

THE ARBITRABILITY OF AN IMPLIED CLAIM UNDER THE 1934 ACT IS AN ISSUE OF NATIONAL SIGNIFICANCE

The issue presented by this case is significant, not only for Merrill Lynch, but for the entire securities industry and for thousands of brokerage customers as well. The issue is equally significant to the administration of justice in the federal courts. Hundreds, if not thousands, of civil actions are filed annually under the 1934 Act.[3] Cumulatively, these cases — including many meritless claims —

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[2]In *Byrd,* reiterating reservations expressed earlier in *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974); *reh'g denied,* 419 U.S. 885, 95 S. Ct. 157, 42 L. Ed. 2d 129 (1974), the Court questioned those lower federal court decisions that had simply transferred the bar to arbitration of 1933 Act claims to allegations made under the 1934 Act. Justice White, concurring, observed that the issue of the arbitrability of 1934 Act claims "remains open and the contrary holdings of the lower courts must be viewed with some doubt." 470 U.S. at 225, 105 S. Ct. at 1244, 84 L. Ed. 2d at 168 (White, J., concurring).

[3]Statistics filed by the Administrative Office of the United States Courts indicate that over 3,064 private civil actions under federal "Securities, Commodities and Exchanges" statutes were filed in the district courts between April 1, 1985 and March 31, 1986. *See* Administrative Office of the United States Courts, *Federal Judicial Workload Statistics for the Twelve Month Period Ended March 31, 1986,* Table C-2 at 13.

impose an enormous cost upon the already overburdened courts as well as upon the securities industry.

This is so even though the claimants in most of these cases have contractually committed to arbitrate any disputes with their securities brokers. As a result of the decision below and decisions in other circuits that have ruled similarly,[4] however, the strong congressional policy favoring enforcement of such agreements has been nullified, and the public cost Congress sought to avoid through the Arbitration Act has become instead an increasing public burden.

Moreover, the arbitrability of 1934 Act claims has been litigated in well over 100 cases decided since *Byrd*. *See* 30 a. Thus, the issue here involved is widely litigated, of industry-wide significance, and with national application. Without action by the Court now, the surge of litigation involving this issue is certain to continue, and inconsistent results of the sort that have already appeared are bound to proliferate, to the detriment of litigants and the courts alike.

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[4]*See Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197 (3d Cir. 1986), *petition for cert. filed*, No. 86-487 (Sept. 25, 1986); *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3032 (U.S. July 14, 1986) (No. 86-44); *Intre Sport v. Kidder*, 795 F.2d 1004 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3023 (U.S. July 16, 1986) (No. 86-40); *Miller v. Drexel Burnham Lambert, Inc.*, 791 F.2d 850 (11th Cir. 1986); *King v. Drexel Burnham Lambert, Inc.*, 796 F.2d 59 (5th Cir. 1986).

II

A DIRECT CONFLICT EXISTS BETWEEN THE CIRCUITS AS TO THE ARBITRABILITY OF JUDICIALLY IMPLIED 1934 ACT CLAIMS

Merrill Lynch and the entire securities industry face diametrically opposed decisions in different circuits as to the arbitrability of judicially implied 1934 Act claims.

The Second, Third, Fifth and Eleventh Circuits, relying to a great extent on the precedent of prior decisions within those circuits, have refused enforcement of agreements to arbitrate claims arising under section 10(b). *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986); *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197 (3d Cir. 1986); *Miller v. Drexel Burnham Lambert, Inc.*, 791 F.2d 850 (11th Cir. 1986); *King v. Drexel Burnham Lambert, Inc.*, 796 F.2d 59 (5th Cir. 1986). In the instant case, the Ninth Circuit denied enforcement of an agreement to arbitrate claims arising under section 10(b), relying on its decision in *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520.

Conversely, the Eighth Circuit has held that the same Merrill Lynch customer agreement which exists in this case includes an agreement to arbitrate claims implied under the 1934 Act. *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393 (8th Cir. 1986).

The conflict among the circuits is thus advertent and direct, and has a substantial impact on petitioner. Only a ruling by this Court will resolve it.

III

THE COURT OF APPEALS DECISION CONCERNING THE ARBITRABILITY OF AN IMPLIED RIGHT OF ACTION UNDER THE 1934 ACT IS IN CONFLICT WITH THE APPLICABLE DECISION OF THIS COURT.

The decision reached by the Ninth Circuit in *Conover*, 794 F.2d 520, and in this case, as well as the previous decisions of the Second, Third, Fifth and Eleventh Circuits on the instant issue, conflict with this Court's recent decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. ____, 105 S. Ct. 3346, 87 L. Ed. 2d 444. Although this Court did not directly address the instant issue in *Mitsubishi*, in holding that the Arbitration Act mandates arbitration of claims arising under the Sherman Act in the context of an international commercial transaction, the Court set forth the test for determining whether a federal statutory claim is arbitrable and rejected the same justifications for denying arbitration advanced by the Ninth Circuit in *Conover* and in the instant case.

In *Mitsubishi*, this Court expressly held that exceptions to arbitration of statutory claims are to be found *only* in congressional pronouncements:

> "Just as it is the congressional policy manifested in the federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable. . . . We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a

> judicial forum, that intention will be deducible from text or legislative history. . . . *Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.*

Id. at ____, 105 S. Ct. at 3355, 87 L. Ed. 2d at 456 (emphasis added). (Citations omitted)

Thus, the question in this case is whether congressional policy articulated in the 1934 Act prohibits arbitration of a judicially implied claim arising under section 10(b) of the 1934 Act, despite the strong congressional policy favoring arbitration.

The starting point of the analysis is this Court's decision in *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953). *Wilko* involved a claim under section 12(2) of the 1933 Act, 15 U.S.C. § 77l(2), and the perceived conflict between that section and section 2 of the Arbitration Act. Section 12(2) expressly provides a right of action to an individual purchasing a security sold in violation of other provisions of the 1933 Act. The plaintiff in *Wilko* had signed an agreement containing a predispute arbitration clause. Wilko argued that to order arbitration pursuant to the Arbitration Act would contradict section 14 of the 1933 Act, 15 U.S.C. § 77n, which voids "[a]ny condition, stipulation, or provision binding any person . . . to waive compliance with any provision . . ." of the 1933 Act.

In deciding not to enforce the arbitration clause, despite the language of section 2 of the Arbitration Act, this Court noted that Congress created in section 12(2) of the 1933 Act a "special right . . . which differs substantially from the common-law action in that the seller is made to assume the burden of proving lack of scienter," which is

"enforceable in any court of competent jurisdiction — federal or state — and removal from a state court is prohibited." *Id.* at 431, 74 S. Ct. at 184-85, 98 L. Ed. at 173 (footnote omitted). The Court held that the arbitration provision was a "stipulation" requiring the plaintiff to waive compliance with these express provisions of section 12(2) of the 1933 Act, and was, therefore, void. *Id.* at 434-35, 74 S. Ct. at 186, 98 L. Ed. at 175. Thus, the Court in *Wilko* essentially applied the *Mitsubishi* test by finding express statutory provisions enacted by Congress in the 1933 Act which indicated Congress' intent to preclude 1933 Act claims from arbitration.

In contrast, no statutory conflict is present in the instant case. As this Court noted in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 513, 94 S. Ct. 2449, 2454, 41 L. Ed. 2d 270, 278 (1974), "[t]here is no statutory counterpart of § 12(2) in the Securities Exchange Act of 1934, and neither § 10(b) of that Act nor rule 10b-5 speaks of a private remedy to redress violations of the kind alleged here." Likewise, the special nature of the right to recover for misrepresentations under section 12(2), where the seller is made to assume the burden of proving lack of scienter, is not present in the judicially implied remedy under section 10(b) of the 1934 Act, which is "not so different from the common law action." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. at 225, 105 S. Ct. at 1244, 84 L. Ed. 2d at 168 (White, J., concurring).

In the absence of a direct statutory conflict between the 1934 Act and the Arbitration Act, the analysis engaged in by the Ninth Circuit, which essentially weighs the policies underlying the 1934 Act against those underlying the Arbitration Act, was both erroneous and unnecessary. For it is Congress, rather than the courts, which must balance the competing policies involved. The language of

the Arbitration Act, which this Court has held "[b]y its terms . . . mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed" must prevail. *See Byrd* at 218, 105 S. Ct. at 1241, 84 L. Ed. 2d at 163.

Moreover, the policy analysis used by the Ninth Circuit in *Conover*, 794 F.2d 520, and applied in this case, fails. In denying arbitration of section 10(b) claims, the Ninth Circuit concluded in *Conover* at 524, that "[t]he policies served by judicial enforcement of section 10(b) and Rule 10b-5 reflect the unsuitability of arbitration for such claims," and as examples of the policy cited (1) the deterrent effect of redressing violations in federal court, (2) the alleged overbearing of securities dealers vis-a-vis securities customers and (3) the purported need for judicial direction to ensure the effectiveness of the protective provisions of the 1934 Act. Each of these justifications for denying arbitration was asserted in *Mitsubishi*, 473 U.S. ____, 105 S. Ct. 3346, 87 L. Ed. 2d 444, and each was rejected.

Regarding the alleged deterrent effect of actions by private litigants in federal court, in *Mitsubishi* this Court stated that "[n]otwithstanding its important incidental policing function, the treble-damages cause of action" under the antitrust laws "seeks primarily to enable an injured competitor to gain compensation for that injury." *Id.* at ____, 105 S. Ct. at 3359, 87 L. Ed. 2d at 460. That conclusion is even more compelling under the 1934 Act where compensation is limited to actual damages. 15 U.S.C. § 78bb.

The allegation that securities customers are subject to overbearing by securities dealers was also considered by the *Mitsubishi* Court in the antitrust context and rejected as an "undemonstrated assumption that the arbitration clause is tainted." The Court noted that a party resisting

arbitration may directly attack the validity of the arbitration agreement if the party believes that the agreement was fraudulently procured. *Id.* at ____, 105 S. Ct. at 3357, 87 L. Ed. 2d at 459.

The focus by the Ninth Circuit on the bargaining position of parties to arbitration agreements reflects more than merely a concern for freely negotiated agreements. It also appears to reflect two underlying presumptions: (1) that the arbitration process is biased or unfair, and (2) that the statutory rights at issue cannot or will not be properly vindicated in arbitration. Both presumptions were rejected in *Mitsubishi*. With respect to the former, this Court reasoned:

> "We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators."

Id. at ____, 105 S. Ct. at 3358, 87 L. Ed. 2d at 460. With respect to the latter, the Court concluded:

> "By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."

Id. at ____, 105 S. Ct. at 3355, 87 L. Ed. 2d at 456.

A third factor noted by the Ninth Circuit as demonstrative of the unsuitability of section 10(b) claims for arbitration was the purported need for judicial direction to ensure the effectiveness of the protective provisions of the 1934 Act. The Court also addressed this contention in *Mitsubishi* by observing that "so long as the prospective litigant effectively may vindicate its statutory cause of

action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at ____, 105 S. Ct. at 3359-60, 87 L. Ed. 2d at 461-62. The likelihood of such vindication in the section 10(b) context is enhanced by the fact that section 10(b) claims are "not so different from the common law action." *Byrd,* 470 U.S. at 225, 105 S.Ct. at 1245, 84 L.Ed 2d at 168 (White, T., concurring) Claims for common law fraud are regularly sent to arbitration and resolved by arbitrators. *See, e.g., Southland Corp. v. Keating,* 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

In sum, the policy justifications against arbitration which were articulated by the Ninth Circuit in *Conover,* 794 F.2d 320, were rejected by this Court in *Mitsubishi,* 473 U.S. ____, 105 S. Ct. 3346, 87 L. Ed. 2d 444. Moreover, the policy analysis in which the Ninth Circuit engaged was unnecessary and inappropriate, as there is no statutory conflict between the 1934 Act and the Arbitration Act. As Justice White noted in his concurring opinion in this Court's decision in *Byrd,* 470 U.S. at 224, 105 S. Ct. at 1244, 84 L. Ed. 2d at 167, "*Wilko's* reasoning cannot be mechanically transplanted to the 1934 Act." The factors and concerns which led this Court in *Wilko* to deny enforcement of the arbitration agreement as to section 12(2) claims simply are not present with respect to section 10(b) claims. Therefore, this Court should resolve the conflict among the circuits by holding that the Arbitration Act mandates arbitration of judicially implied claim under section 10(b) of the 1934 Act, when that claim is otherwise referable to arbitration under an agreement between the parties.

CONCLUSION

A review of the issue in the instant case by this Court will resolve an important question of federal law concerning the rights of contracting parties to arbitration, settle a difference between a decision of the Court of Appeals and an applicable decision of this Court, reconcile a conflict among the circuits, and provide direction which will have a substantial impact on federal court caseloads. For these reasons, petitioner respectfully requests that its Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

October 21, 1986

Respectfully submitted,

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APPENDIX

No. 85-6103

D.C. # CV-84-3869-MRP

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID DELMAN,
Plaintiff-Appellee,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., a Delaware Corporation,
Defendant-Appellant.

MEMORANDUM*

NOT FOR PUBLICATION

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding
Argued and submitted May 8, 1986
Filed July 25, 1986

Before: BROWNING, SCHROEDER, and BOOCHEVER, Circuit Judges.

Appellant Merrill Lynch, Pierce, Fenner & Smith, Inc. appeals the district court order denying its petition to compel arbitration of plaintiff-appellee David Delman's claim under the Securities and Exchange Act of 1934. Our recent decision in *Conover v. Dean Witter Reynolds, Inc.*, No. 85-6082, controls this case, and therefore, we affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

In 1982, Delman opened a cash management account with Merrill Lynch and signed a written customer agreement which contained an arbitration provision. In July 1984, Delman brought this action in district court, claiming that Merrill Lynch violated section 10(b) of the Securities Exchange Act of 1934, and alleging state law claims. On April 11, 1985, after the Supreme Court decided *Dean Witter Reynolds, Inc. v. Byrd*, 105 S. Ct. 1238 (1985), Merrill Lynch filed its petition for an order compelling arbitration of both the federal and state law claims. The district court granted Merrill Lynch's motion to compel arbitration of the state law claims, but denied the motion as to the federal securities claim. Merrill Lynch then brought this appeal.

In *Conover v. Dean Witter Reynolds, Inc.*, we concluded that agreements to arbitrate controversies arising under section 10(b) of the 1934 act are unenforceable. Therefore, the district court properly refused to compel arbitration of Delman's claim arising under section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder.

Affirmed.

Case No. CV 84-3869 MRP

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DAVID DELMAN,

Plaintiff,

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH INC., a Delaware corporation,

Defendant.

AMENDED MEMORANDUM AND ORDER

Filed: July 22, 1985.

Defendant's petition for an order compelling arbitration and staying proceedings, and plaintiff's motion for partial summary judgment were heard together on June 10, 1985 before the Honorable Mariana R. Pfaelzer. The Court issued a Memorandum and Order with respect thereto which was entered June 27, 1985. On July 10, 1985, defendant's motion to amend this Court's order of June 27, 1985 to include certification pursuant to 28 U.S.C. § 1292(b) was heard before the Honorable Mariana R. Pfaelzer. After considering the arguments made and the papers filed, the Court issues the following Memorandum and Orders:

DISCUSSION

A. Background

Plaintiff, David Delman ("Delman"), brought this action against Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch") alleging violations of federal securities laws, § 10(b) and § 13(c) of the Securities Act of 1934 ("1934 Act"), fraud, breach of fiduciary duty, and negligence. In March 1980, Delman was involved in a serious

automobile accident in which he sustained head and brain injuries. Delman received $1.3 million in settlement of the accident after attorneys' fees were paid. On the recommendation of his attorney, Delman sought investment advice with respect to the settlement from Merrill Lynch account executive Patrick Tuohy ("Tuohy") at Merrill Lynch's San Jose office. Delman states that he explained to Tuohy the source of his funds and his need for conservative investments to preserve the capital and provide him with a safe and reliable source of income.

In approximately March 1982, Delman entered into a written Customer Agreement with Merrill Lynch and opened a Cash Management Account ("CMA"). The CMA Customer Agreement contains an arbitration clause. It is undisputed that, at the time Delman signed the Customer Agreement, Tuohy did not discuss the arbitration clause with Delman.

In March or April 1982, Delman alleges that Tuohy called him and recommended that he purchase a security option. According to Delman, neither Tuohy nor anyone else at Merrill Lynch informed him of the risks of option trading. Delman alleges that Merrill Lynch assured him that option trading was "sure profit," and consistent with a conservative investment strategy. After Delman agreed to purchase options, Tuohy sent an Option Trading Agreement to Delman at his home. Delman executed the agreement and sent it back to Merrill Lynch. The Option Trading Agreement contains an arbitration clause almost identical to the clause contained in the Customer Agreement which Delman had earlier signed. Merrill Lynch does not dispute the fact that Tuohy never discussed the arbitration clause in the Option Trading Agreement with Delman.

In July 1984, Delman brought this action. On April 11, 1985, after the Supreme Court handed down its decision

in *Dean Witter Reynolds, Inc. v. Byrd,* 53 U.S.L.W. 4222 (March 4, 1985), Merrill Lynch filed its petition for an order compelling arbitration of both the state and federal claims and staying these proceedings. On May 1, 1985, Delman moved for partial summary judgment arguing, among other things, that the arbitration clauses in both the CMA Customer Agreement and the Option Trading Agreement were adhesion contracts and were unenforceable under California law.

B. Arbitration

Both the CMA Customer Agreement and the Option Trading Agreement signed by Delman contain arbitration clauses. Paragraph 11 of the Customer Agreement states:

> It is agreed that any controversy between us arising out of your business or this agreement, shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, Inc., or pursuant to the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc.

Paragraph 9 of the Option Trading Agreement states:

> Any controversy between us arising out of such option transactions or this agreement shall be settled by arbitration only before the National Association of Securities Dealers, Incorporated, or the New York Stock Exchange, or an Exchange located in the United States upon which listed options transactions are executed.

Until very recently, Ninth Circuit precedent would have precluded the arbitration of Delman's claims because, in the same action, both federal securities claims and pendent state claims are alleged. *Byrd v. Dean Witter Reynolds, Inc.*, 726 F.2d 522 (9th Cir. 1984). However, the

Supreme Court reversed the Ninth Circuit's decision in *Byrd*, holding that where there is an arbitration agreement within the scope of the Federal Arbitration Act, 9 U.S.C. §§ 2-4, and both state and federal securities claims are alleged, the state claims must be arbitrated despite the fact that federal securities claims are to be adjudicated in the court proceedings. *Byrd*, 53 U.S.L.W. at 4223.

Section 2 of the Arbitration Act provides:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.§ 2. Section 2 is a "declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). However, not all arbitration agreements will be enforced under § 2. There are two limitations on enforceability: (1) the agreement to arbitrate must be part of a written maritime contract or a contract "evidencing a transaction involving commerce," and (2) the arbitration agreement is subject to any contract defenses. Thus, "the underlying issue of arbitrability . . . [is] a question of substantive federal law," but "a party may assert general contract defenses . . . to avoid enforcement of an arbitration agreement." *Southland Corp. v. Keating*, 52 U.S.L.W. 4134, 4135 n.10 (Jan 23, 1984). Both the scope of the Arbitration Act and the enforceability of these particular arbitration agreements are at issue in this case.

Delman and Merrill Lynch agree that both the Customer Agreement and the Option Trading Agreement involve commerce, and both are obviously in writing. Delman, however, argues that federal securities claims are outside the scope of the Arbitration Act, and thus that his claims under §§ 10(b) and 13(c) of the Securities Act of 1934 cannot be arbitrated. Delman also argues that the arbitration clauses are unenforceable as a matter of California law.

1. Federal Securities Claims

In *Wilko v. Swann*, 396 U.S. 427 (1953), the Supreme Court held that a predispute agreement to arbitrate claims that arise under § 12(2) of the Securities Act of 1933 was not enforceable. The Ninth Circuit has extended the *Wilko* analysis to the 1934 Act. Thus, predispute agreements to arbitrate any federal securities claims are unenforceable. *DeLancie v. Birr, Wilson & Co.*, 648 F.2d 1255 (9th Cir. 1981).

In *Byrd*, the Supreme Court refused to reconsider *Wilko* or to decide the applicability of the *Wilko* rationale to § 10(b) claims. *Byrd,* 53 U.S.L.W. at 4222, n. l. In his concurring opinion, however, Justice White argued that the applicability of *Wilko* to the 1934 Act "was a matter of substantial doubt." *Id.* at 4225. On the basis of Justice White's concurrence, Merrill Lynch argues that "this Court is free to examine the Ninth Circuit's extension of *Wilko* to 1934 Act claims," and urges the Court to send Delman's federal claims to arbitration. The Court declines this invitation because, despite Justice White's concurrence, the law in the Ninth Circuit is that all federal securities claims must be decided by the court and not by an arbitrator. Thus, the Court will not enforce the arbitration agreements which respect to the federal claims.

2. The Enforceability of the Arbitration Clauses

Merrill Lynch does not dispute the fact that some arbitration clauses may be unenforceable, but it argues that federal, rather than state law determines enforceability. Conversely, Delman argues that federal law determines the scope of arbitration, but that state law determines the enforceability of a particular agreement. The Court finds that Delman's analysis more closely approaches its own.

Section 2 states explicitly that arbitration agreements will be enforced "save upon such grounds as exist at law or in equity for the revocation of *any contract.*" (Emphasis added.) Thus, at a minimum, and despite any developing federal common law of arbitration agreements, state law contract defenses could apply to an arbitration agreement. In *Southland,* 52 U.S.L.W. at 4136, the Court noted that "a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement." Fraud is indisputably a state law contract defense. Thus, if as a matter of state law, the agreement to arbitrate would not be enforced, this court should not order arbitration.

a. The Merrill Lynch Arbitration Agreements

In *Parr v. Superior Court,* 188 Cal. Rptr. 801 (1983), a California appellate court held that a clause in a Merrill Lynch Customer Agreement identical to the clause at issue in this case, was an adhesion contract. A contract of adhesion is "a standardized contract, which imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject." *Graham v. Scissor-Tail, Inc.,* 171 Cal. Rptr. 604, 610, 28 Cal. 3d 807, 817 (1984). The Customer Agreement and the Option Trading Agreement fit this definition. *See Parr,* 188 Cal. Rptr. at 801;

Hope v. Superior Court, 175 Cal. Rptr. 851 (App. 1981); *Richards v. Merrill Lynch, Pierce, Fenner & Smith,* 135 Cal. Rptr. 26 (App. 1976).

The fact that the arbitration clauses are adhesion contracts, however, does not make them unenforceable. Indeed, in *Parr,* the court enforced the Merrill Lynch Customer Agreement against an investor. There are two limitations on the enforcement of an adhesion contract or provisions thereof. An adhesion contract will not be enforced against the weaker or "adhering" party, if the contract does "not fall within that party's reasonable expectations," or even if consistent with the parties' expectations, the contract, in its context, is unduly oppressive or unconscionable. *Scissor-Tail,* 171 Cal. Rptr. at 612.

i. Unconscionability

A "dispute settlement arrangement" is unenforceable if it fails to meet "minimum levels of integrity." *Scissor-Tail,* 171 Cal. Rptr. at 615. Relying on *Hope,* 175 Cal. Rptr. at 851, and *Richards,* 135 Cal. Rptr. at 26, Delman argues that the arbitration agreements are unenforceable because they require arbitration before a New York Stock Exchange ("NYSE") arbitrator.[1] Merrill Lynch is a member of the NYSE and has a seat on the Board of Governors. In *Hope,* the court held that there was "a presumptive *institutional* bias in favor of (NYSE) member firms and members who constitute the electoral constituency of the (NYSE) board." *Hope,* 175 Cal. Rptr. at 856. In *Richards,* the court concluded that the potential

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[1]The parties agree that the rules governing arbitrations with the NYSE, the National Association of Securities Dealers, Inc., or any other Exchange upon which listed options are traded are substantially identical. For purposes of brevity, the Court will refer to the NYSE rules throughout this Order.

for abuse by Merrill Lynch under an NYSE arbitration was too great to enforce the provision against a customer. The court based its decision on, among other things, the fact that all of the arbitrators are appointed by either the Board of Governors of the NYSE or the Chair of the Exchange, that controversies are arbitrated at the time and place designated by the arbitrator, that the exchange may alter, amend, or repeal any of the rules and procedures applicable to arbitration, and that the arbitrators are given wide discretion to determine the procedures for each arbitration. *Richards*, 135 Cal.Rptr. at 28-29.

In *Parr,* however, the court reviewed both the *Hope* and the *Richards* decisions and read them in light of the recently amended NYSE arbitration rules. The court found that the NYSE rules met "minimum levels of integrity." The court took judicial notice of the fact that the Securities and Exchange Commission ("SEC") approved the new arbitration rules and that the SEC is charged with protecting the public in the area of securities. *Parr*, 188 Cal. Rptr. at 805. The *Parr* decision, in addition to being the most recent California court pronouncement on the Merrill Lynch arbitration clause and the NYSE arbitration proceedings, is well reasoned and persuasive. An NYSE arbitration would not deny Delman his "common law right of fair procedure." *Scissor-Tail*, 171 Cal. Rptr. at 615. Of course, if Delman is ultimately dissatisfied with the NYSE arbitration, he can petition the Court to vacate the arbitration award. *See* Cal. Code Civ. Proc. §§ 1285.8, 1286.2; *Parr*, 188 Cal. Rptr. at 806.

ii. Delman's Reasonable Expectations

The question of whether the adhering party reasonably expected that he or she would be required to arbitrate his or her claims, is a fact-based inquiry for which there is no clear standard. *See Parr*, 188 Cal. Rptr. at 804. In the

context of a malpractice action against a hospital, where a patient was being admitted pursuant to his doctor's orders and signed a hospital admission form which contained an arbitration clause, the court held that absent "plain and clear notification" of the terms and an "understanding consent thereto," the clause would not be enforced. *Wheeler v. St. Joseph Hospital*, 133 Cal. Rptr. 775, 784 (1977). In *Parr*, in the context of a broker-client relationship, the court noted that in *Keating v. Superior Court*, 183 Cal. Rptr. 360 (1981), the California Supreme Court stated that a "provision for arbitration in a commercial context is quite common, and reasonably to be anticipated." Although the *Parr* court did not articulate a precise standard, the Court reads the *Parr* opinion to apply a reasonable investor standard. In effect, what the court asked was whether a reasonable investor would have read the arbitration clause and understood what it meant. The court found that the fact that the plaintiff in *Parr* claimed that he had never read the clause was irrelevant. The issues were simply: could he read the contract, was he given a chance to read it, and would he have understood it had he read it.

In this case, although Delman does stress his mental impairments, there is no allegation that he cannot read or comprehend written words. Delman only claims that he has trouble remembering what he reads. Delman does not state that he never read the contracts or the arbitration clauses, he simply asserts that Merrill Lynch had an affirmative obligation to discuss the arbitration clause with him, or at a minimum, to incorporate the NYSE arbitration rules into the Customer Agreement and Option Trading Agreement.

Neither contract is very long. The Customer Agreement consists of approximately 15 paragraphs and is printed in large and easy to read type. The arbitration clause is

paragraph 11, which is on the front page of the two-page agreement. The Option Trading Agreement is even shorter. It consists of 12 paragraphs and covers one-half of a legal page. The type is smaller on the Option Trading Agreement than it is on the Customer Agreement, but it is still quite legible.

In short, the Court finds that Delman had notice of the clauses in both contracts and that the clauses were within his reasonable expectations. With respect to Delman's state claims, the arbitration agreements should be enforced.

C. Procedural Posture of This Case

The Court does not believe that the interests of justice would best be served by a stay of the federal claims in this Court. Thus, the Court will allow discovery to proceed with respect to the federal claims, and the Court will conduct a settlement conference with the parties. The Court sets the pre-trial conference date for September 16, 1985, and sets trial for October 22, 1985. Delman's pending motion for partial summary judgment shall be renoticed in accordance with the Local Rules.

D. Certification under 28 U.S.C. § 1292(b).

The Court recognizes that the portion of this order refusing to refer plaintiff's claim under the 1934 Act to arbitration involves a controlling question of law, on which there is a substantial ground for difference of opinion respecting its correctness. An immediate appeal from this order will materially advance the ultimate termination of this litigation. Accordingly, this Court will certify that portion of this order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

THEREFORE, IT IS ORDERED that:

1. Defendant's motion for an order compelling arbitration of the state law claims is granted;

2. Defendant's motion for an order compelling arbitration of the federal securities law claims is denied;

3. Defendant's motion for an order staying the federal court proceedings is denied;

4. Plaintiff's motion for partial summary judgment with respect to the federal securities claims is placed off calendar. Plaintiff's counsel shall re-notice that motion in accordance with the Local Rules;

5. Discovery with respect to the federal securities law claims shall proceed;

6. The settlement conference which was scheduled for June 24, 1985 shall be rescheduled. Counsel are to set a settlement conference with the court clerk;

7. The pre-trial conference will be conducted on September 16, 1985, at 1:30 P.M. and trial will commence October 22, 1985, at 10:00 A.M.;

8. The portion of this Order refusing to refer plaintiff's claim under the 1934 Act to arbitration is certified to the Ninth Court of Appeals pursuant to 28 U.S.C. 1292(b) because the issue involves a controlling question of law, on which there is a substantial ground for difference of opinion respecting its correctness, and an immediate appeal from the Order will materially advance the ultimate termination of this litigation.

9. Counsel shall advise the Court forthwith as to whether or not the Ninth Circuit accepts the interlocutory appeal.

DATED: July 22, 1985

MARIANA R. PFAELZER

MARIANA R. PFAELZER
United States District Judge

Presented By:

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN P.C.
WILLIAM K. SWANK
MAREN E. NELSON

By MAREN E. NELSON

MAREN E. NELSON
Attorneys for Defendant
MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.

STATUTORY PROVISIONS

United States Arbitration Act, ch. 392, 61 Stat. 670 (1947) (codified at 9 U.S.C. § 2):

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Securities Exchange Act of 1934, Section 10(b), 15 U.S.C. § 78j(b):

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —
>
> . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

MERRILL LYNCH PIERCE FENNER & SMITH INC.
CUSTOMER AGREEMENT

In consideration of your accepting and carrying one or more accounts for the undersigned, the undersigned hereby agrees that:

1. APPLICABLE RULES AND REGULATIONS

All transactions shall be subject to the constitution, rules, regulations, customs, and usages of the exchange or market and its clearing house, if any, upon which such transactions are executed.

2. DEFINITION

For purposes of this agreement, "securities and other property" shall include, but shall not be limited to, money, securities and commodities of every kind and nature and all contracts and options relating thereto, whether for present or future delivery.

3. SECURITY INTEREST

All securities and other property now or hereafter held, carried or maintained by you in or for any of the accounts of the undersigned, now or hereafter opened, including any accounts in which the undersigned may have an interest, shall be subject to a lien for the discharge of all the indebtedness and other obligations of the undersigned to you, and are to be held by you as security for the payment of any liability or indebtedness of the undersigned to you in any of said accounts. You shall have the right to transfer securities and other property so held by you from or to any other of the accounts of the undersigned whenever in your judgment you consider such a transfer necessary for your protection. In enforcing your lien, you shall have the discretion to determine which

securities and property are to be sold and which contracts are to be closed.

4. LIQUIDATION

You shall have the right to require additional collateral in accordance with your general policies regarding your margin maintenance requirements, as such may be modified, amended or supplemented from time to time, or if in your discretion you consider it necessary for your protection at an earlier or later point in time than called for by said general policies, or in the event that a petition in bankruptcy or for appointment or a receiver is filed by or against the undersigned, or an attachment is levied against the accounts of the undersigned, or in the event of the death of the undersigned, to sell any or all securities and other property in the accounts of the undersigned with you, whether carried individually or jointly with others, to buy any or all securities and other property which may be short in such accounts, to cancel any open orders and to close any or all outstanding contracts, all without demand for margin or additional margin, notice of sale or purchase, or other notice or advertisement. Any such sales or purchases may be made at your discretion on any exchange or other market where such business is usually transacted, or at public auction or private sale; and you may be the purchaser for your own account. It is understood that any prior demand or call or prior notice of the time and place of such sale or purchase shall not be considered a waiver of your right to sell or buy without any such demand, call or notice as herein provided.

5. PAYMENT OF INDEBTEDNESS UPON DEMAND

The undersigned shall at all times be liable for the payment upon demand of any debit balance or other obligations owing in any of the accounts of the undersigned with you and the undersigned shall be liable to you

for any deficiency remaining in any such accounts in the event of the liquidation thereof, in whole or in part, by you or by the undersigned, and the undersigned shall make payment of such obligations and indebtedness upon demand.

6. Liability for Costs of Collection

The reasonable costs and expenses of collection of the debit balance and any unpaid deficiency in the accounts of the undersigned with you, including, but not limited to, attorneys fees, incurred and payable or paid by you shall be payable to you by the undersigned.

7. Pledge of Securities and Other Property

All securities and other property now or hereafter held, carried or maintained by you in your possession in any of the accounts of the undersigned may be pledged and repledged by you from time to time, without notice to the undersigned, either separately or in common with other such securities and other property for any amount due in the accounts of the undersigned, or for any greater amount, and you may do so without retaining in your possession or under your control for delivery a like amount of similar securities or other property.

8. Margin Requirements and Credit Charges

The undersigned will at all times maintain such securities and other property in the accounts of the undersigned for margin purposes as you shall require from time to time and the monthly debit balances or adjusted balances in such accounts shall be charged, in accordance with your usual custom, with interest at a rate permitted by the laws of the State of New York.

9. ACCOUNTS CARRIED AS CLEARING BROKER

If you are carrying the account of the undersigned as clearing broker by arrangement with another broker through whose courtesy the account of the undersigned has been introduced to you, then until receipt from the undersigned of written notice to the contrary, you may accept from such other broker, without inquiry or investigation by you (i) orders for the purchase or sale in said account of securities and other property on margin or otherwise, and (ii) any other instructions concerning said account. You shall not be responsible or liable for any acts or omissions of such other broker or its employees.

10. PRESUMPTION OF RECEIPT OF COMMUNICATIONS

Communications may be sent to the undersigned at the address of the undersigned or at such other address as the undersigned may hereafter give you in writing, and all communications so sent, whether by mail, telegraph, messenger or otherwise, shall be deemed given to the undersigned personally, whether actually received or not.

11. AGREEMENT TO ARBITRATE CONTROVERSIES

It is agreed that any controversy between us arising out of your business or this agreement shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, Inc. or pursuant to the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., as the undersigned may elect. If the controversy involves any security or commodity transaction or contract related thereto executed on an exchange located outside the United States, then such controversy shall, at the election of the undersigned, be submitted to arbitration conducted under the constitution of such exchange or under the provisions of the Constitu-

tion and Rules of the Board of Governors of the New York Stock Exchange, Inc. or the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc. Arbitration must be commenced by service upon the other of a written demand for arbitration or a written notice of intention to arbitrate, therein electing the arbitration tribunal. In the event the undersigned does not make such designation within five (5) days of such demand or notice, then the undersigned authorizes you to do so on behalf of the undersigned.

12. THE LAWS OF THE STATE OF NEW YORK GOVERN

This agreement and its enforcement shall be governed by the laws of the state of New York; shall cover individually and collectively all accounts which the undersigned may open or reopen with you; and shall enure to the benefit of your successors whether by merger, consolidation or otherwise, and assigns, and you may transfer the accounts of the undersigned to your successors and assigns, and this agreement shall be binding upon the heirs, executors, administrators, successors and assigns of the undersigned.

13. EXTRAORDINARY EVENTS

You shall not be liable for loss caused directly or indirectly by government restrictions, exchange or market rulings, suspension of trading, war, strikes, or other conditions beyond your control.

14. REPRESENTATION AS TO CAPACITY TO ENTER INTO AGREEMENT

The undersigned represents that the undersigned is of full age, that the undersigned is not an employee of any exchange, or of any corporation of which any exchange owns a majority of the capital stock, or of a member of

any exchange, or of a member firm or member corporation registered on any exchange or of a bank, trust company, insurance company or of any corporation, firm or individual engaged in the business of dealing either as broker or as principal in securities, bills of exchange, acceptances or other forms of commercial paper. The undersigned further represents that no one except the undersigned has an interest in the account or accounts of the undersigned with you.

15. PURPOSE OF CREDIT

The undersigned acknowledges and agrees that credit extended hereafter to the undersigned in this account is primarily for investment or business purposes.

16. JOINT AND SEVERAL LIABILITY

If the undersigned shall consist of more than one individual, their obligations under this agreement shall be joint and several.

17. SEPARABILTIY

If any provision or condition of this agreement shall be held to be invalid or unenforceable by any court, or regulatory or self-regulatory agency or body, such invalidity or unenforceability shall attach only to such provision or condition. The validity of the remaining provisions and conditions shall not be affected thereby and this agreement shall be carried out as if any such invalid or unenforceable provision or condition were not contained herein.

18. HEADINGS ARE DESCRIPTIVE

The headings of each provision hereof is for descriptive purposes only and shall not be deemed to modify or

qualify any of the rights or obligations set forth in each such provision.

X FOR USE BY INDIVIDUALS, INCLUDING JOINT ACCOUNTS:

Signature; DAVID DELMAN

Signature: _____

(Second Party, if Joint Account)

Date: _____

X FOR USE BY SPECIAL ACCOUNTS ONLY: EXAMPLES — TRUSTS AND PARTNERSHIPS

Applicant (Account Title): _____

(Please Print)

By (Signature): _____

By (Signature): _____

(Examples: Trustee, General Partner) (Please Print)

By (Signature): _____

Title: _____

(Examples: Trustee, General Partner) (Please Print)

Date: _____

LENDING AGREEMENT

To: Merrill Lynch, Pierce, Fenner & Smith Incorporated, New York, New York

You are hereby specifically authorized to lend to yourselves, as principal or otherwise, or to others, any securities held by you on margin for any accounts of the undersigned or as collateral therefor, either separately or with other securities.

This agreement shall enure to the benefit of your successors, by merger, consolidation or otherwise, and assigns, and you may transfer the account of the undersigned to any such successors or assigns.

X FOR USE BY INDIVIDUALS, INCLUDING JOINT ACCOUNTS

Signature: DAVID DELMAN

Signature: _____
(Second Party, if Joint Account)

Date: _____

X FOR USE BY SPECIAL ACCOUNTS ONLY: EXAMPLES — TRUSTS AND PARTNERSHIPS

Applicant (Account Title): _____
(Please Print)

By (Signature): _____

Title: _____
Examples: Trustee, General Partner) Please Print)

By (Signature): _____

Title: _____
(Examples: Trustee, General Partner) (Please Print)

Date: _____

STANDARD OPTION AGREEMENT
INDIVIDUAL AND JOINT ACCOUNTS ONLY

Gentlemen:

In connection with any transaction executed by you on my behalf for the purchase and sale of put and call options, I agree as follows:

1. All transactions shall be subject to the constitution, rules, regulations, customs, and usages of the exchange, or market and its clearing house, if any, where executed. I further agree that I will not, either alone or in concert with others violate the position or exercise limits which the Exchanges or marketplace where executed, may establish from time to time as set forth in the prospectus of the Options Clearing Corporation ("OCC").

2. In the case of options sold or written by me in a cash account:

   (a) With respect to a call option which if exercised against me will require the delivery of securities sold, I will keep such securities in my account with you until the expiration of the option period, and will not sell or withdraw such securities. If the option is exercised, you may deliver such securities to the purchaser without previous notice to me.

   (b) With respect to any put option which if exercised against me will require payment for securities purchased, I will keep in my account sufficient funds for such payment until the expiration of the option period, and will not withdraw such funds or utilize them for any purpose. If the option is exercised you may use such

funds for the purchase of such securities without previous notice to me.

3. Any securities and funds held by you in any account of mine with you shall be held by you as security for the performance by me of my obligations to you under this agreement.

4. As option transactions involve a high degree of risk, I understand that:

   (a) I should not purchase an option unless I am able to sustain a total loss of the premium and transaction costs, and I should not write a call option unless I either own the underlying security (or a security convertible, exchangeable, or exercisable into such underlying security) or am able to sustain substantial financial losses, and that I should not write a put option unless I am able to sustain substantial financial losses.

   (b) I may not be able to close a position in the event that a secondary market in the option ceases to exist or the listing exchange restricts or suspends trading in the option.

5. I have been advised of and agree to abide by your policies and federal regulations regarding margining of options and related transactions.

6. I agree to advise you of any changes in my financial situation and needs, experience, or investment objectives.

7. In case of my insolvency, death or attachment of my property, you may, with respect to any pending options, take such steps as you consider necessary to protect yourself against loss.

8. Any agreement by me with you, whether previously or hereafter made applicable to any account of mine

with you, shall also apply to such option transactions except to the extent which it conflicts with this agreement. In the event of a conflict, this agreement shall control, and where this is no conflict, each provision of each agreement shall apply.

9. Any controversy between us arising out of such option transactions or this agreement shall be settled by arbitration only before the National Association of Securities Dealers, Incorporated, or the New York Stock Exchange, or an Exchange located in the United States upon which listed options transactions are executed. I shall have the right of election as to which of the foregoing tribunals shall conduct the arbitration. Such election is to be by registered mail, addressed to Merrill Lynch's head office at 165 Broadway, New York, N.Y. 10080, attention of the Law Department. The notice of election is to be postmarked five days after the date of your demand to make such election. At the expiration of the five days, I hereby authorize Merrill Lynch to make such election on my behalf.

10. I understand that exercise assignment notice for option contracts are allocated among customer short positions in accordance with the date of the transaction which established the short position. Positions which were established earliest will be assigned first ("First-In, First-Out"). A more detailed description of MLPF&S's allocation procedure is available upon request.

11. Absent the written designation of an agent to transact business on my behalf (power of attorney), I alone may make trading decisions in my account; however, unless I give specific instructions to the contrary, you may exercise discretion in the selection

of the exchange or marketplace for the execution of dually traded options.

12. This agreement and its enforcement shall be governed by the laws of the State of New York.

I (WE) HAVE RECEIVED AND READ A CURRENT OPTION CLEARING CORPORATION PROSPECTUS AND ARE AWARE OF THE SPECIAL RISKS ATTENDANT TO OPTION TRADING. THE STATEMENTS CONTAINED ON THIS FORM ARE ACCURATE.

DAVID DELMAN	4-27-82
Customer's Signature	Date Signed
Spouse's Signature (Required for Joint Accounts)	Date Signed

OPTION INFORMATION-INDIVIDUAL & JOINT ACCOUNT

Personal and Financial Data Furnished By Customer

Account Number: 233-58933; Customer's Name: David Delman; Street Address: 137½ Dolphin Ave.; City: Seal Beach; State: California; Zip Code: 90740; Date of Birth, 7/4/57; No. of Dependents, 0; Home Phone Number: (213) 430-6814; Customer's Employer: Self-Employed; Retired ☐; Business Phone No.: same; Spouse's Name (If Applicable):

Customer's Approximate Annual Earnings: ☐ Below $25,000 — State Amount $_____; ☐ $25,000 — $50,000 ☐ $50,000 — $100,000 ☒ Over $100,000; Spouse's Approximate Income (If Applicable): $_____; Combined Total Annual Income From All Sources: $250,000; Customer's Liquid Assets: Cash: $100,000; Securities: $1.3 million; Total Liquid Assets: $1.4 million; Other Assets (Omit Equity in Home): ; Customer's Approximate Net Worth: $1.4 million.

Required Documents: ☐ Option Clearing Corp. Prospectus & Supplements Provided To Customer; Date Due - 4/21/81; Power of Attorney: ☐ Ltd. ☐ General; Name of Agent ; Code 108 Hypothecation Consent Form Signed By Customer, ☒ CMA; Investment Objectives: ☒ Income; ☒ Trading; ☒ Speculation; Does Customer Have Restricted Stock? ☐ Yes ☒ No; Is Customer A Control Person? ☐ Yes ☒ No; (If Yes, Shares of Restricted Stock or Stock Held by a Control Person, Except to the Extent Salable Under Rule 144, May Not Be Used To Cover A Short Position in Call Option Contracts, Satisfy Margin Requirements or Be Delivered Against Exercise of a Put or Call Option.)

Type of Option Trading Desired: ☒ Buy Calls; ☒ Buy Puts; ☒ Spreads; ☒ Write Calls: ☒ Covered; ☒ Uncovered;

☒ Write Puts; ☒ Combinations (Straddle, Etc.); List Accounts With Other Firms: 1. _____; 2 _____; Check All Investment Experience That Apply: ☐ Options ____ Yrs.; Stock ☐ Stock 5 Yrs.; ☐ Bonds ____ Yrs.; ☐ Commodities ____ Yrs.; ☐ Other (Specify) _____ Yrs.; Prior Trading Activity: ☐ Seldom; ☒ Moderate; ☐ Active

Declarations Approvals
To Be Completed By Office Manager
Prior To Option Trading

☒ Approved For Option Trading As Follows: ☒ Buy Calls; ☒ Buy Puts; ☒ Spreads; ☒ Write Calls: ☒ Covered; ☒ Uncovered; ☒Write Puts; ☒Combinations (Straddles, Etc.); Account Executive's Signature: Steven Hester; Date, 10/14/82; Manager's Signature (Must Be R.O.P. & Officer) Pat Tuohy; Date, 4/21/82; Registered Option Principal's Signature of Other Than Manager, Must Be Officer) Richard Ruffine; Date 5/5/82

District Court Decisions Concerning the Enforceability of Agreements to Arbitrate Section 10(b) Claims

A. Cases Holding Section 10(b) Claims Arbitrable

First Circuit

Arent v. *Shearson/American Express, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 92,523 (D. Mass. Dec. 20, 1985)

Mowbray v. *Moseley, Hallgarten, Estabrook & Weden, Inc.*, No. 83-2851-C (D. Mass. July 16, 1985), *vacated*, No. 85-1647 (1st Cir. July 3, 1986)

Prawer v. *Dean Witter Reynolds, Inc.*, 626 F. Supp. 642 (D. Mass. 1985)

Sevinor v. *Merrill Lynch, Pierce, Fenner & Smith*, No. 84-3240-N (D. Mass. July 19, 1985)

Second Circuit

Brener v. *Becker Paribas Inc.*, 628 F. Supp. 442 (S.D.N.Y. 1985)

Finkle & Ross v. *A.G. Becker Paribas, Inc.*, 622 F. Supp. 1505 (S.D.N.Y. 1985)

Ilan v. *Shearson/American Express, Inc.*, 632 F. Supp. 886 (S.D.N.Y. 1985)

Intre Sport Ltd. v. *Kidder Peabody & Co.*, 625 F. Supp. 1303 (S.D.N.Y. 1985), *modified*, Fed. Sec. L. Rep. (CCH) ¶ 92,714 (S.D.N.Y. Apr. 21, 1986)

Jarvis v. *Dean Witter Reynolds, Inc.*, 614 F. Supp. 1146 (D. Vt. 1985)

Johnson v. *Kidder Peabody & Co.*, No. 85 Civ. 178 (N.D.N.Y. July 29, 1985)

McMahon v. *Shearson/American Express, Inc.*, 618 F. Supp. 384 (S.D.N.Y. 1985), *aff'd in part, rev'd in part*, 788 F.2d 94 (2d Cir. 1986)

Shamir v. *Kidder, Peabody & Co.*, Fed. Sec. L. Rep. (CCH ¶ 92,511 (S.D.N.Y. Mar. 11, 1985)

Terra Resources I v. *Burgin*, Fed. Sec. L. Rep. (CCH) ¶ 92,703 (S.D.N.Y. Apr. 1, 1986)

Wall Street Assocs. v. *Becker Paribas, Inc.*, No. 85 Civ. 4649 (S.D.N.Y. Sept. 19, 1985)

Third Circuit

Baker v. *Paine, Webber, Jackson & Curtis, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,757 (D.N.J. Apr. 10, 1986)

Fourth Circuit

Fisher v. *Prudential-Bache Securities, Inc.*, No. Y-86-388 (D. Md. May 12, 1986)

Land v. *Dean Witter Reynolds, Inc.*, 617 F. Supp. 52 (E.D. Va. 1985)

Shotto v. *Laub*, 632 F. Supp. 516 (D. Md. 1986)

Fifth Circuit

Coonly v. *Rotan Mosle, Inc.*, No. A-83-CA-529 (W.D. Tex. June 11, 1985)

Frye v. *Paine, Webber Jackson & Curtis*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,516 (N.D. Tex. Dec. 26, 1985)

Hymel v. *Delta Petroleum & Energy Corp.*, No. SA-83-CA-362 (W.D. Tex. June 19, 1985)

Sixth Circuit

Gerhardstein v. *Shearson/American Express, Inc.* [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,512 (N.D. Ohio Mar. 10, 1986)

Moncrieff v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 623 F. Supp. 1005 (E.D. Mich. 1985)

Yee v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, No. 84-4017 (E.D. Mich. Mar. 31, 1986)

Seventh Circuit

Austad v. *Drexel Burnham Lambert, Inc.*, No. 85-C-9759 (N.D. Ill. Mar. 27, 1986)

Steinberg v. *The Illinois Co.*, No. 85-C-7131 (N.D. Ill. May 15, 1986)

Willis v. *Prudential-Bache Securities, Inc.*, No. L 85-0959 (N.D. Ind. July 10, 1985)

Eighth Circuit

Bob Ladd, Inc. v. *Adcock*, 633 F. Supp. 241 (E.D. Ark. 1986)

Houlihan v. *Schmacker* and *Meyer* v. *Schmacker*, Nos. 83-159 C(5) and 83-1356 C(5) (E.D. Mo. May 3, 1985)

Peele v. *Kidder, Peabody & Co. Inc.*, 620 F. Supp. 61 (W.D. Mo. 1985) (appeal pending)

Sulit v. *Dean Witter Reynolds, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,755 (W.D. Mo. Mar. 27, 1986)

Ninth Circuit

Anderson v. *Paine Webber Jackson & Curtis*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,446 (C.D. Cal. Sept. 23, 1985)

Byrd v. *Dean Witter Reynolds, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,225 (S.D. Cal. July 8, 1985) (on remand from Supreme Court)

Dees v. *Distenfield*, 618 F. Supp. 123 (C.D. Cal. 1985)

Geller v. *Nasser*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,409 (C.D. Cal. Nov. 18, 1985)

Jope v. *Bear Stearns & Co.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,393 (N.D. Cal. Nov. 15, 1985)

Mann v. *Foster & Marshall/American Express, Inc.*, No. C84-925D (W.D. Wash. June 3, 1985)

Marx v. *Dean Witter Reynolds, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,311 (C.D. Cal. Aug. 23, 1985)

Sacks v. *Dean Witter Reynolds, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,429 (C.D. Cal. Dec. 31, 1985)

Schultz v. *Robinson-Humphrey/American Express, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 92,515 (M.D. Ga. Mar. 4, 1986)

West v. *Drexel Burnham Lambert, Inc.*, 623 F.Supp. 26 (W.D. Wash. 1985)

Tenth Circuit

Blakely v. *Prudential-Bache Securities, Inc.*, No. A-85-442-BRT (D. Nev., Dec. 9, 1985)

Eleventh Circuit

Batteh v. *Prudential-Bache Securities, Inc.*, No. 84-452-Civ-J-14 (M.D. Fla. July 29, 1985)

Boyd v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 614 F.Supp. 940 (S.D. Fla. 1985)

Chandler v. *Drexel Burnham Lambert, Inc.*, No. C-85-1585-A (N.D. Ga. Oct. 29, 1985) (appeal pending)

Colangelo v. *Dean Witter Reynolds, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,365 (M.D. Fla. July 23, 1985)

Driscoll v. *Smith Barney, Harris Upham & Co.*, No. 84-8223 (S.D. Fla. June 6, 1985)

Finn v. *Davis*, 610 F. Supp. 1079 (S.D. Fla. 1985)

Greenstein v. *First Biscayne Corp.*, No. 82-0584 Civ. (S.D. Fla. May 16, 1985)

Gregory v. *Merrill Lynch, Pierce, Fenner & Smith*, No. 84-1647 Civ. 1-10 (M.D. Fla. Apr. 9, 1985)

Hashemi v. *Merrill Lynch, Pierce, Fenner & Smith*, No. C82-2948A (N.D. Ga. Aug. 6, 1985)

Miller v. *Drexel Burnham Lambert, Inc.*, 83-6871 (S.D. Fla. July 31, 1985), *rev'd*, Fed. Sec. L. Rep. (CCH) ¶ 92,783 (11th Cir. June 17, 1986) (per curiam)

Niven v. *Dean Witter Reynolds, Inc.*, [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,059 (M.D. Fla. Mar. 28, 1985)

Pruzan v. *Paine, Webber, Jackson & Curtis*, No. C84-2016A (N.D. Ga. Aug. 30, 1985)

Raiford v. *Merrill Lynch, Pierce, Fenner & Smith*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,269 (N.D. Ga. May 16, 1985)

Rockoff v. *Shearson Lehman/American Express, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,513 (S.D. Fla. Feb. 12, 1986)

Ross v. *Mathis*, 624 F. Supp. 110 (N.D. Ga. 1985)

Sanders v. *Robinson Humphreys/American Express, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,548 (N.D. Mar. 27, 1986)

Schultz v. *Robinson Humphreys/American Express, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,515 (M.D. Ga. Mar. 4, 1986)

Walch v. *Dean Witter Reynolds, Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,060 (M.D. Fla. Apr. 25, 1985)

Westwind Transp., Inc. v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 83-734 (M.D. Fla., Apr. 9, 1985)

B. Cases Holding Section 10(b) Claims Not Arbitrable

District of Columbia Circuit

Kalali v. *Prudential-Bache Securities, Inc.*, No. 85-3237 (D.D.C. June 30, 1986)

Second Circuit

Becker v. *Silverman*, 638 F. Supp. 193 (S.D.N.Y. 1986)

Brill v. *Prudential-Bache Securities, Inc.*, No. 84 Civ. 0846 (S.D.N.Y. June 13, 1986)

Couvaris v. *Paine Webber Jackson & Curtis Inc.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,554 (S.D.N.Y. Feb. 24, 1986)

Clark v. *Kidder, Peabody & Co., Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 92,729 (S.D.N.Y. May 9, 1986)

Farino v. *Advest Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,758 (E.D.N.Y. May 1, 1986)

Gilmore v. *Shearson/American Express, Inc.*, No. 84 Civ. 9011 (S.D.N.Y. May 20, 1986)

Intre Sport, Ltd v. *Kidder, Peabody & Co.*, Fed. Sec. L. Rep. (CCH) ¶ 92,714 (S.D.N.Y. Apr. 21, 1986), *aff'd*, 795 F.2d 1004 (2d Cir. 1986), *pet. for cert. filed*, No. 86-40 (July 16, 1986)

IRPA Corp. v. *Shearson/American Express, Inc.*, No. 85 Civ. 1629 (S.D.N.Y. May 28, 1986)

Leone v. *Advest, Inc.*, 624 F. Supp. 297 (S.D.N.Y. 1985)

Levine v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 92,841 (S.D.N.Y. July 22, 1986)

Luce v. *Edelstein, et al.*, Fed. Sec. L. Rep. (CCH) ¶ 92,258 (Aug. 8, 1985)

Rush v. *Oppenheimer & Co.*, No. 84 Civ. 3219 (S.D.N.Y. June 27, 1986) (dicta) (decided after *McMahon*)

Weizman v. *Adornato*, 625 F. Supp. 1101 (E.D.N.Y. 1985)

Third Circuit

Blumenthal v. *Dean Witter Reynolds, Inc.*, No. 84-4799F (D. N.J. July 3, 1985), *reprinted in* 2 RICO L. Rptr. 275 (1985) *aff'd in part and rev'd in part*, 797 F.2d 1197 (3d Cir. 1986)

Burris v. *Paine Webber, Jackson & Curtis, Inc.*, No. 85-5517 (D.N.J. 1985), *aff'd*, 797 F.2d 1197 (3d Cir. 1986)

Erlbaum v. *Prudential-Bache Securities, Inc.*, No. 84-5541 (E.D. Pa. Aug. 9, 1985)

Gant v. *Kidder, Peabody & Co.*, No. 85-5439 (D.N.J. 1984), *aff'd*, 797 F.2d 1197 (3d Cir. 1986)

Green v. *Shearson Lehman/American Express, Inc.*, No. 85-1368 (Sept. 10, 1985)

Fourth Circuit

Blomquist v. *Churchill,* 633 F. Supp. 131 (D.S.C. 1985) *Glavin* v. *Prudential-Bache Securities, Inc.,* 623 F. Supp. 629 (D.S.C. 1985)

Levendag v. *Churchill,* 623 F. Supp. 620 (D.S.C. 1985)

Fifth Circuit

Bustamante v. *Rotan Mosle, Inc.,* 633 F. Supp. 303 (S.D. Tex. 1986)

Cummings v. *A.G. Edwards & Sons, et al.,* 637 F. Supp. 132 (M.D. La. 1986).

King v. *Drexel Burnham Lambert, Inc.,* No. 3-Civ-85-000-932-P (N.D. Tex. Oct. 29, 1985), *aff'd,* No. 85-1717 (5th Cir. May 28, 1986)

Woodyard v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* No. H-85-5615 (S.D. Tex. July 10, 1986)

Sixth Circuit

Sterne v. *Dean Witter Reynolds, Inc.,* No. C-1-85-124 (S.D. Ohio Jan. 18, 1986) (appeal pending)

Seventh Circuit

Barr v. *The Illinois Co.,* No. 84-C-2076 (N.D. Ill. Oct. 29, 1985)

Gibson v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* No. 84-C-7542 (N.D. Ill. June 18, 1985)

Goldberg v. *Drexel Burnham Lambert, Inc.,* No. 83-C-8586 (N.D. Ill. Jan. 15, 1986)

Robert A. Stone & Assocs. v. *Drexel Burham Lambert, Inc.,* No. 85-C-6927 (N.D. Ill. Nov. 15, 1985)

Winkler v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* No. 85-C-9120 (N.D. Ill. Apr. 25, 1986)

Eighth Circuit

Bale v. *Dean Witter Reynolds, Inc.* and *Haertel* v. *Dean Witter Reynolds, Inc.*, 627 F. Supp. 650 (D. Minn. 1986)

Nesslage v. *York Securities, Inc.*, 107 F.R.D. 389 (E.D. Mo. 1985) (appeal pending)

Webb v. *R. Rowland & Co.*, 613 F. Supp. 1123 (E.D. Mo. 1985) (appeal pending)

Ninth Circuit

Rhoades v. *Powell, et al.*, No. CV-F-85-549 (E.D. Cal. Sept. 5, 1986)

Schnitzer v. *Oppenheimer & Co.*, 633 F. Supp. 92 (D. Ore. 1985)

Tenth Circuit

Adams v. *Merrill Lynch, Pierce Fenner & Smith, Corp.*, [1985-86 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,328 (W.D. Okla. Sept. 20, 1985)

Coffey v. *Dean Witter Reynolds, Inc. et al.*, No. 8-K-2256 (D. Colo. July 16, 1986)

Eleventh Circuit

Gorman v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 609 F. Supp. 1054 (S.D. Fla.), *aff'd*, 780 F.2d 1032 (11th Cir. 1985) (*en banc* rehearing pending)

Krieck v. *Dean Witter Reynolds, Inc.*, No. GCA 84-0085 (N.D. Fla. Apr. 24, 1985)

Rojas Cancanon v. *Smith Barney, Harris Upham & Co.*, 612 F. Supp. 996 (S.D. Fla. 1985)

Scharp v. *Cralin & Co.*, 617 F. Supp. 476 (S.D. Fla. 1985)

Wolfe v. *E. F. Hutton & Co.,* No. 84-151-Civ.-Orl-18 (M.D. Fla. Mar. 30, 1985)

C. Case Stayed Pending Eighth Circuit Decision in *Phillips*

Minnesota Odd Fellows Home Foundation v. *Engler & Budd Co.,* 630 F. Supp. 797 (D. Minn. Mar. 2, 1986)

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 21, 1986, I served the within Petition for a Writ of Certiorari in re: "Merrill Lynch, Pierce, Fenner & Smith Inc. vs. David Delman" in the United States Supreme Court, October Term 1986, No. .....;

on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Dale F. Kinsella, Esq.
Kinsella, Boesch, Fujikawa & Toole
1875 Century Park East
Suite 1600
Los Angeles, CA 90067

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 21, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

(N)